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No. _____

In the Supreme Court of the United States

October Term, 1987

DONALD L. KONG; MAY S. KONG

Petitioners,

vs.

HAWAIIAN MARINE LINES, INC., a Delaware corporation; WILLAMETTE IRON AND STEEL COMPANY; GUY F. ATKINSON COMPANY,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF OF RESPONDENT HAWAIIAN MARINE LINES, INC. IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Ninth Circuit Court of Appeals properly affirmed the finding that the vessel owner was not negligent.

2. Whether the Ninth Circuit Court of Appeals properly affirmed the dismissal of WISCO[1] on the basis that WISCO could not have reasonably foreseen that a loose turnbuckle would create an unreasonably dangerous condition.

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[1] *Willamette Iron and Steel Company performed work on the subject barge including work on the turnbuckle.*

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BRIEF OF RESPONDENT HAWAIIAN MARINE LINES, INC. IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondent Hawaiian Marine Lines, Inc. ("HML") respectfully requests that this Court deny the petition for a writ of certiorari.

STATEMENT OF THE CASE

Several years before the subject accident, which occurred on December 24, 1980, Castle & Cooke stevedores initiated the process of opening and closing the bargehouse doors on the barge with the assistance of a forklift[2,3], which process would often create slack in the cable wire. This slack would be removed using winches. The practice of properly using the forklift and taking up the slack was safe and did not pose an unreasonable risk of harm or danger to anyone.

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[2] *(Record reference to App. _____. are to the Appendix filed by Petitioner. References to R.App. _____ are to the Appendices filed with this brief.)*

[3] *(R.App.A. A-27-29, A-63-65)*

The evidence clearly established that before the barge was turned over to the stevedores prior to the subject accident, the condition of the barge doors permitted cargo operations to be carried out with reasonable safety[4].

On the day of the subject accident, Petitioner DONALD KONG (hereinafter referred to as "Petitioner"), was assigned by Castle & Cooke, the stevedoring company for which he worked, as supervisor of the loading of the barge operated by HML. Castle & Cooke employees regularly supervised the loading and unloading operations

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[4] *(R.App.A, A-132-137)*

including the opening and closing of the bargehouse doors[5,6].

On the day of the accident the Castle & Cooke stevedores attempted to close the port bargehouse door first rather than the starboard door, contrary to the regular practice[7], causing slack to develop in the cable of the port door[8]. There was no stevedore using the winch to take up any of the slack as was the usual practice, even though the winch wheel was on board the barge and

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[5] *¶ III of the contract for stevedore services between HML and stevedore Castle & Cooke Terminals, Ltd. provides, in pertinent part: "[Stevedore] agrees to ... (g) perform one (1) opening and closing of vessel's cargo house doors...."*

[6] *(R.App.A, A27-28, A-60-63, A-80-82)*

[7] *(R.App.A, A-40-41, A-41-45, A-55-56)*

[8] *(R.App.A, A-2-3, A-40-41, A-55-58, A-84-87)*

the winches were operable[9]. The slack in at least one of the cables caused it to become entangled with one or both of the other cables so that the starboard door would not completely close[10].

In an attempt to untangle the cables, Petitioner ascended the starboard door without regard for his personal safety by not using a safety belt, personnel carrier or ladder, all of which safety devices were available[11]. Upon reaching the top of the 16 foot starboard door, and while balancing on the batten board, Petitioner grabbed one of the door cables with one hand and the other in his

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[9] *(R.App.A. A-47-50)*

[10] *(R.App.A. A-2-3, A-40-41, A-55-58, A-84-87)*

[11] *(R.App.A. A-13-15, A-22-23, A-33-36, A-45-46, A-67-70, A-92-101, A-114-123, A-127-131)*

other hand and began to "whip" both cables by jerking, turning, and rotating them over one another trying to untangle them[12]. As a result of his whipping motion the right bolt end of the cable unthreaded from the body of the turnbuckle and became disengaged from the starboard turnbuckle[13]. When the follower cable came loose from the starboard turnbuckle Petitioner lost his balance and fell onto the forklift below him[14].

Although an HML representative was present on the barge at the time of the accident, he was not aware that the bargehouse doors were being closed in a manner opposite to the way in which the

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[12] *(R.App.A, A-3-7, A-8-11, A-15-21, A-23-25, A-43-45, A-58-60)*

[13] *(R.App.A, A-109-114)*

[14] *(R.App.A, A-3-5)*

doors were normally closed, and was not aware of the subsequent entanglement. No Castle & Cooke employee notified the HML representative that the starboard door was jammed, that the cables were tangled or that Plaintiff would ascend the starboard door and grasp one loose cable in one hand and the other loose cable in the other[15].

An investigation the following morning revealed that the bolt holding the end of the follower cable at the starboard turnbuckle had unscrewed and separated from the turnbuckle. There was no locking wire through the hole at the end of the bolt latched onto the barrel[16].

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[15] *(R.App.A, A-52-55, A-76-92)*

[16] *(R.App.A, A-7-8, A-10-13)*

HML did not know that the bolt was unloosening from the starboard turnbuckle above the doors. During the barge's first voyage to Honolulu after leaving Portland, an HML operations manager had visually inspected the turnbuckles above the doors from the deck and did not see any improperly attached turnbuckle or one that needed adjusting[17]. Further, when the Oahu returned to Portland, the senior port engineer for Columbia Marine Lines stood on the deck to check for loose, broken or hanging cable and did not notice any[18]. When the Oahu arrived in Honolulu two days before the accident, as part of his normal routine HML's area manager looked at the cable to see if it was intact and taut, and he observed that

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[17] *(R.App.A, A-30-33)*

[18] *(R.App.A, A-103-106)*

it was[19].

HML neither knew nor had any reason to know of the absence of lock wires; prior inspection of the Oahu did not indicate the lock wires were absent, and, significantly, no turnbuckle bolt had ever separated from the turnbuckle on an HML barge cargo house door[20]. In any case, lock wires were not necessary for the safe closing of the bargehouse doors[21].

REASONS FOR DENYING THE WRIT

I. PETITIONER IS ATTEMPTING TO REKINDLE THE SCHEME EXISTING PRIOR TO THE 1972 AMENDMENTS TO THE LONGSHOREMEN'S AND HARBORWORKERS' COMPENSATION ACT

Prior to the 1972 Amendments to the Longshoremen's and Harbor Workers'

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[19] *(R.App.A, A-70-74)*

[20] *(R.App.A, A-30-33, A-65-67, A-70-74, A-90-92, A-101-102, A-103-107)*

[21] *(R.App.A, A-37-38)*

Compensation Act, proof of unseaworthiness required no proof of fault on the part of the vessel owner other than an unsafe condition on the vessel. "This was true even though the condition was caused, created, or brought into play by the stevedore or its employees." *Scindia Steam Nav. Co., Ltd. v. De Los Santos*, 451 U.S. 156, 101 S.Ct. 1614, 1620-21, 68 L.Ed.2d 1 (1981) (citations omitted). The 1972 Amendments, particularly by adding §905(b), "... radically changed this scheme of things[,]" *Scindia*, 101 S.Ct. at 1621, and "have been hailed as a much-needed reform which will substantially lighten the dockets of the over-burdened federal courts." G. Gilmore and C. Black, Jr., *The Law of Admiralty* §6-5, at 280 (1975).

After 1972 a longshoreman was entitled to significantly greater

compensation from the stevedore, and his right to recover for unseaworthiness was abolished. In addition the stevedore's obligation to indemnify the shipowner, if the shipowner was held liable to the longshoreman, was abolished. 33 U.S.C. §905(b) *et seq.*; *Scindia*, 101 S.Ct. at 1621. The 1972 Amendments, however, still provided the longshoreman with the right to recover from the shipowner for negligence, but for only two particular scenarios of negligence. Since 1972 the vessel and equipment provided to the stevedore must be in such condition that cargo operations may be executed with reasonable safety, and the shipowner must warn the stevedore of any hazards present on the ship which the shipowner should have known about in the exercise of reasonable care. *Scindia*, 101 S.Ct. at 1622.

The 1972 Amendments and their impact

on the liability of vessel owners was discussed by this Court in *Scindia*, 101.S.Ct. at 1620-1621, and footnotes 11-13. While considering the application of the 1972 Amendments in *Scindia* this Court held:

> Congress intended to make the vessel answerable for its own negligence and to terminate its automatic, faultless responsibility for conditions caused by the negligence or other defaults of the stevedore. Cases holding the vessel liable on the ground that it owed nondelegable duties to protect the longshoremen from injury were rejected. (citations omitted) It would be inconsistent with the Act to hold, nevertheless, that the shipowner has a continuing duty to take reasonable steps to discover and correct dangerous conditions that develop during the loading or unloading process.... "[C]reation of a shipowner's duty to oversee the stevedore's activity and insure the safety of longshoremen would ... saddle the shipowner with precisely the sort of nondelegable duty that Congress sought to eliminate by amending section 905(b)." (citation omitted)

Scindia, 101 S.Ct. at 1622-1623.

Respondent HML respectfully submits that any expansion of a shipowner's

liability beyond that which is delineated by the 1972 Amendments and as discussed by this Court in *Scindia* is a matter most appropriately left to legislation. Petitioner, however, is attempting to return to the pre-1972 scheme of things by expanding the liability of shipowner HML.

As will be more fully discussed below, and as already decided by this Court in *Scindia*, HML is only negligent if it failed to provide the stevedore with an unreasonably safe barge or if it failed to warn the stevedore of an unreasonably safe hidden defect. After considering all of the evidence, after listening to all of the witnesses, and after considering the totality of facts, the Ninth Circuit Court of Appeals has already determined as a conclusion of law that HML met its duty by providing the stevedore with a vessel upon which safe

operations could reasonably be conducted, and was not negligent[22,23].

II. THE NINTH CIRCUIT'S DECISION IS NOT IN CONFLICT WITH A PRIOR DECISION OF THIS COURT

Pursuant to Rule 17(1)(c) of the Rules of the Supreme Court of the United States a review on writ of certiorari will be granted "only when there are special and important reasons ... ", such as when a federal court "has decided a federal question in a way in conflict with applicable decisions of this

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[22] *HML questions the litigious nature of Petitioner's position in light of the fact that Petitioner has already been generously compensated and shall continue to be compensated as a result of his injuries, pursuant to the 1972 Amendments. Thus, Petitioner has already benefited from the more streamlined and timely compensation scheme established by the 1972 Amendments and has avoided the inefficient and tedious pre-1972 tripartite system of seeking compensation for a maritime-related injury.*

[23] *(App. B, p. A-37)*

Court." Petitioner herein contends that the Ninth Circuit misinterpreted this Court's holding in *Scindia Steam Navigation Co., Ltd. v. De Los Santos*, 451 U.S. 156, 101 S.Ct. 1614, 68 L.Ed.2d 1 (1981). Thus the Ninth Circuit's decision in this action should not be reviewed on writ of certiorari unless (1) its decision conflicts with *Scindia* and (2) such a conflict is deemed special and important enough to warrant a review.

A. The Ninth Circuit's Decision is in accordance with this Court's Decision in *Scindia Steam Navigation Co., Ltd. v. De Los Santos*

In its Memorandum filed July 23, 1987[24], the Ninth Circuit cited *Scindia* and affirmed the trial court's finding of no third-party liability:

> The primary responsibility for maintaining safe conditions on board a vessel during cargo operations

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[24] *(App.B, A-29-30)*

> rests on the stevedore. (citation omitted) A shipowner may also incur liability toward longshoremen employed by stevedores but only in circumstances where the shipowner has breached a duty to intervene or warn of a hazard. Such a duty may arise when the owner (1) has actual or constructive knowledge of a dangerous condition, (2) knows that the longshoremen are continuing to work despite the existence of an unreasonable risk of harm to them, and (3) could not reasonably expect that the stevedore would remedy the situation. *Scindia*, 451 U.S. at 175-176. (emphasis added)

The Ninth Circuit's interpretation and application of *Scindia* was not, as Petitioner contends, erroneous. *Scindia* sets forth the standard of care that a shipowner owes to a stevedoring company. A longshoreman in *Scindia* sued the shipowner for injuries suffered as a result of a malfunctioning winch which was part of the ship's gear. With respect to the duty owed by a shipowner to a stevedore at the outset of cargo operations when the ship is turned over to the stevedore, this Court set forth

the following standard of care:

> [T]he duty of exercising due care "under the circumstances[,]" ... extends at least to excercising ordinary care under the circumstances to have the ship and its equipment in such condition that an expert and experienced stevedore will be able by the exercise of reasonable care to carry on its cargo operations with reasonable safety to persons and property, ... 101 S.Ct. at 1622. (emphasis added)

Secondly, this Court held that no general duty was owed by a shipowner to a stevedore after the beginning of cargo operations:

> [A]bsent contract provision, positive law, or custom to the contrary -- none of which has been cited to us in this case -- the shipowner has no general duty by way of supervision or inspection to exercise reasonable care to discover dangerous conditions that develop within the confines of the cargo operations that are assigned to the stevedore.... The shipowner within limits, is entitled to rely on the stevedore, and owes no duty to the longshoreman to inspect or supervise the cargo operations. 101 S.Ct. at 1625. (emphasis added)

Thus Respondent need only have delivered the barge to the stevedore in a

condition which, with the exercise of reasonable care, the stevedore could unload and load with reasonable safety. Further, Petitioner had no duty whatsoever to supervise or inspect "dangerous conditions" that may have arisen during the course of the unloading and loading of the barge.

Before a shipowner can be found negligent under *Scindia*, it must have had actual or constructive knowledge of the existence of an unreasonable risk of harm, must know that the longshoremen will continue to work despite the unreasonable risk of harm, and cannot reasonably expect the stevedore to remedy the unreasonable risk of harm. *Scindia*, 101 S.Ct. at 1626.

Petitioner, however, asserts that the Ninth Circuit misapprehended the facts by holding Respondent was not negligent "because it could not reasonably forsee

[sic] that the cable would unscrew from the turnbuckle and that there would be no locking wire to prevent the turnbuckle from separating from the cable." The Ninth Circuit's decision was not as simple and solely focused on the missing turnbuckle as Petitioner makes it appear.

The Ninth Circuit found that the manner in which the longshoremen opened and closed the bargehouse doors was "safe and efficient", and that prior to the subject accident there were no known incidents where a bolt had disengaged from a turnbuckle[25], and that while on two occasions before the subject accident longshoremen had failed to use the winches to take up the slack, thereby entangling the cables, on both occasions

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[25] *(App.B, A-35)*

the longshoremen untangled the cables "without injury or risk to anyone."[26]

In addition, the Ninth Circuit determined that it was not reasonably foreseeable that manually untangling the cables would cause the cables to disengage causing Petitioner's fall and injuries, and concluded that the district court's factual determination that Respondent was not negligent was not clearly erroneous[27].

Finally, the Ninth Circuit found that HML's representative was not consulted at anytime prior to the accident by any of the stevedore's employees even though he was present on the barge at the time of the accident[28]. Thus, HML was not aware that the barge doors had jammed

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[26] *(App.B, A-27)*

[27] *(App.B, A-36-37)*

[28] *(App.B, A-28-29)*

because the doors were closed in the wrong order, and was not aware that Petitioner had attempted to untangle the cables by grasping the two loose cables with each hand[29].

The standard for finding a shipowner negligent in accordance with *Scindia* has not been met in the instant case because, as the Ninth Circuit properly found, the manner in which the longshoremen opened and closed the bargehouse doors, even without the locking wire, did not present an unreasonably dangerous condition[30]. Petitioner is asking this Court to disagree with one of the Ninth Circuit's findings by asserting the Ninth Circuit misinterpreted this Court's holding in *Scindia*.

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[29] *(App.B, A-28-29)*

[30] *(App.B, A-35-36)*

B. A shipowner is negligent only if a defect existing from the outset presents an unreasonable risk of harm.

Petitioner also contends *Scindia* holds that if a defect proximately causing an injury exists from the outset the shipowner is liable. The nature of the defect in *Scindia* differed significantly from the missing locking wire in the subject incident. In *Scindia* this Court stated:

> On the facts posited here, for two days prior to the accident, it had been apparent to those working with the winch that this equipment was malfunctioning. Even so, whether it could be safely used or whether it posed an unreasonable risk of harm to ... longshoremen was a matter of judgment committed to the stevedore in the first instance. The malfunctioning being obvious and Seattle having continued to use it ... it is quite possible, ... that Seattle's judgment in this respect was so obviously improvident that Scindia, if it knew of the defect and that Seattle was continuing to use it, should have realized the winch presented an unreasonable risk of harm to the longshoremen, and that in such circumstances it had a duty to intervene and repair the ship's

> winch. The same would be true if the defect existed from the outset and Scindia must be deemed to have been aware of its condition. (emphasis added)

Scindia, 101 S.Ct. at 1626.

The defect in *Scindia* was egregious and had been obvious for two days prior to the accident. This Court opined that shipowner Scindia should have realized the defect presented an unreasonable risk of harm had it known of the defect, and thus had a duty to intervene. *Scindia*, 101 S.Ct. at 1626. This Court did not, however, hold in *Scindia* that a shipowner has a duty to intervene in all cases in which a defect exists from the outset, and breaches its duty when it fails to intervene. This Court stated that "[o]n the facts posited here ... " the shipowner should have realized the defect presented an unreasonable risk of harm since it was so obvious and had been recognized as such for two days.

Scindia, 101 S.Ct. at 1626. Respondent HML respectfully submits that this Court meant a shipowner must be deemed to have been aware of a defect existing from the outset when such a defect presents an unreasonable risk of harm.

There was no finding of fact that Respondent failed to have the barge inspected prior to being used by Petitioner, or that Respondent was negligent in failing to locate the missing locking wire. The Ninth Circuit further failed to find that the missing locking wire, whether or not Respondent or anyone knew or should have known it was missing, presented an unreasonable risk of harm to Petitioner or anyone else. To the contrary, the Ninth Circuit stated:

> Before the accident there were no known incidents where a bolt had ever disengaged from a turnbuckle on cables above the barge door. It would have been reasonable to expect

> that even if a bolt holding an end of a follower cable were to unscrew from its turnbuckle, the cable would merely lose tension and lay on the door mechanism without posing any risk to workmen....In summary, the vessel's duty to warn arises only with respect to hazards that would be likely to be encountered by the stevedore in the course of normal cargo operations.[31]

C. WISCO could not have reasonably foreseen that a loose turnbuckle would create an unreasonably dangerous condition.

The Ninth Circuit did not err in affirming the dismissal of WISCO. The Ninth Circuit found that "there was no foreseeable connection between [WISCO's] alleged installation of the defective turnbuckle and the injury that befell [Plaintiff]."[32] In other words, WISCO could not have expected that a loose turnbuckle would create an unreasonably

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[31] *(App.B, A-35-36)*

[32] *(App. B, p. A-24.)*

unsafe condition. The Ninth Circuit found no evidence in the record to suggest WISCO should have reasonably contemplated that a loose turnbuckle would create an unreasonably unsafe condition[33].

Both of the cases cited by Petitioner in support of his foreseeability argument involve circumstances where obvious danger exists. In *Munsey v. Webb*, 231 U.S. 150, 34 S.Ct. 44, 45, 58 L.Ed 162 (1913), "the possibility and the danger that in some way one in the car should get some part of his person outside the car while it was in motion was obvious, and was shown to have been anticipated ...", while in *Virginian Ry. Co. v. Viars*, 193 F.2d 547, 549 (4th Cir. 1952), the injury was caused by dynamite,

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[33] *(App. B, p. A-23.)*

"which is obviously a dangerous instrumentality ...[.]"

The Ninth Circuit properly affirmed the dismissal of the claim against WISCO since it was not reasonably foreseeable that a loose turnbuckle would create an unreasonably dangerous condition such as the dynamite in *Virginian* and the open elevator in *Munsey*.

III. IN THE ALTERNATIVE, EVEN IF THE NINTH CIRCUIT INCORRECTLY REQUIRED THAT A SPECIFIC INJURY MUST HAVE BEEN FORESEEN BEFORE A SHIPOWNER WILL BE HELD NEGLIGENT, SUCH ERROR WAS HARMLESS

As discussed above, *Scindia* holds that a shipowner has a duty to warn against dangerous conditions and need only ensure its vessel is in a condition upon which work can be accomplished in a reasonably safe manner. The Ninth Circuit, as the trier of fact, considered all of the evidence and determined that the use of a forklift to open and close

the bargehouse door was a reasonably safe procedure, and further found that even with a loose turnbuckle it would be "reasonable to expect that ... the cable would merely lose tension and lay on the door mechanisms without posing any risk to workmen."[34]

Thus, even if the Ninth Circuit erroneously concluded that the shipowner must have foreseen the specific injury and method of injury before it can be found negligent, the Ninth Circuit also interpreted *Scindia* in a fashion properly outlining the duty of a shipowner to present the vessel in a reasonably safe condition. The Ninth Circuit found the barge was in fact in a reasonably safe condition and that the loose turnbuckle and missing locking wire did not render the barge unsafe.

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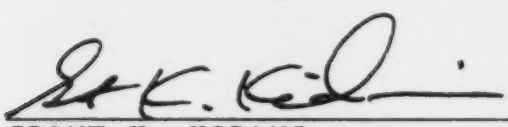
[34] *(App. B, p. A-35-36)*

CONCLUSION

The Ninth Circuit properly applied *Scindia* to the instant action in finding that HML provided Plaintiff with a vessel upon which it was reasonably safe to work. The Petitioner has lost on the merits. The decision of the Court of Appeals is clearly correct on the facts and law and should be allowed to stand without further review.

DATED: November 19, 1987

Respectfully submitted,



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APPENDIX A

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

CIVIL NO. 82-0176

DONALD L. KONG and MAY S. KONG,

Plaintiffs,

vs.

HAWAIIAN MARINE LINES, INC.,

a Delaware corporation; et al.,

Defendants.

TRANSCRIPT OF PROCEEDINGS

VOLUME I OF VII VOLUMES

PAGES 1-156

DATE: May 22, 1986

Donald Kong approached me, and I looked for myself and finally we found it on the barge but far away from where it should have been.

Q And this was after the accident already.

A Yes, after the accident.

Q Could you proceed and tell us, as you tried to close the doors with the forklift, what happened?

A When we tried to close the doors with the forklift, what happened was the cable on the top somehow got tangled, and Donald Kong, the operating supervisor at that time, was standing next to me and Wesley Furtado, George Chock, and the forklift operator, what you call, Joe Flores at that time, operating Hyster 464; and, when the thing got tangled, Wesley Furtado climbed up on the right side of the door, I mean on the left side

of the door to see what the problem was.

Q When you say the left side of the door, was that on the port door?

A When you're facing the door, looking at it from here, that's the port there, yes, on the left.

Q So Mr. Furtado went up on the port door to check to see what was wrong.

A Yes, he did.

Q And what about Mr. Kong?

A Then since Wesley, what you call, had problem up there trying to untangle that cable, Donald Kong, he climbed up also

A Yes.

Q And his right hand?

A The right hand grabbed the one that was entangled.

Q The top cable here?

A Yes.

Q And were these two cables slack or tight?

A Because they were tangled, there was a lot of slack on them.

Q And then what happened?

A When he tried to whip the cable to have it untangled, the motion he did was he grabbed the cable and with his right hand he tried to whip it, you know. When he did that, whatever, somehow the end of the turnbuckle came off. So, with that motion that he had and the strength that he used to untangle the cable--he just whipped it this way--when he did that with that motion, when he whipped it he just fell backwards. He just came down backwards, and then, when he landed, he landed on the 464 prong that's approximately, what you call, ten inches wide and four feet long. So he landed on that Hyster prong there which prevented him from, I guess, more serious injury.

That actually broke the fall of Donald Kong, because the prong was approximately a foot or so above the deck of the barge.

Q After he fell, did you inspect what actually came off?

A Yes, I inspected because knowing the serious injury. The

end of the turnbuckle there came off.

Q All right.

THE COURT: Did you say he grabbed the turnbuckle?

THE WITNESS: What he tried to do was... . There was a tangle on the cable. In other words, it was just overlapping, you know; the opening and closing wires, they were overlapping one another. So, to have it untangled, what he did was just to whip it, try to throw it over; and, when he did that trying to throw it over, what happened is that the

end of the turnbuckle came off. With that motion, he just came down backwards.

Q So when the end of the turnbuckle came off, that caused Mr. Kong to lose his balance and fall off, is that correct?

A Yes.

Q Now, can you tell us... . Could you come down one more time, Mr. Tanaka, because this is important. Is it the end of the starboard turnbuckle that came off?

A Yes, on this end here.

Q All right.

A The starboard turnbuckle.

Q I'm going to show you an exemplar of a turnbuckle with U-bolts on both ends. Is this a similar type of turnbuckle that was on the starboard metal plate as far as the outline, the same type of turnbuckle?

A It's not exactly the same but close enough.

Q The actual one, how is it different?

A I think it was a little larger turnbuckle and heavier turnbuckle than this.

Q Larger and heavier in size.

A Yes, sir.

Q All right. Now, after the accident, did you investigate and inspect what actually came off?

A This end of the turnbuckle came off.

Q When you say this end, looking at the door it would be to the right side?

A The right side the turnbuckle came off.

Q So this whole bolt came off?

A Yes, the whole bolt came off.

Q And the cable wire that was attached to the U-part of the bolt, U-clamp, that

wire came off also, is that correct?

A Oh, that was still attached to here. The whole thing came off, yes.

Q Including the cable wire.

A Yes, sir, right.

Q And that cable wire that came down or came off with this bolt, was that the cable wire that Mr. Kong was holding with ... . Which hand?

A Right hand.

Q Right hand.

A Yes.

THE COURT: Mr. Kirimitsu, let's take a recess for about 15 minutes.

MR. KIRIMITSU: All right.

THE COURT: We stand in recess.

(Recess taken)

MR. KIRIMITSU: Your Honor, for the record, counsel took the librety of drawing in the hatch or what I understand

is the manhole into the diagram.

THE COURT: All right.

MR. KIRIMITSU: As you can see, your Honor, the attorneys are not artists, but it's generally within the confines of what is the manhole.

Q. Mr. Tanaka, before we took the recess, you were describing which wires or which wire Mr. Kong was holding on to. Could you come down to this chart, to the diagram, and demonstrate to yuor Honor which cable was he holding with his right hand, which left, and which actually came off. You can use the pointer or whichever is easier.

A. Donald Kong had his left hand right next to this turnbuckle here. There was tension on this cable.

Q. That wire attached to the starboard turnbuckle, it did have tension, right?

A. Yes. It had tension on it. That's the reason why Donald held on this top

cable here.

Q. Okay.

A And the entanglement was right here, by this roller here. Somehow this cable being slack overlapped the top cable.

Q The lower cable was slack.

A Yeah. Somehow it got tangled with the top cable, and what he tried to do was, with his right hand, looking at this roller here, he tried to untangle it by just throwing it over.

Q Which cable did he hold on to with his right hand?

A With his right hand he held this cable that was loose here.

Q That's the slack cable, the lower cable.

A The lower cable that was slack.

Q And the tight cable with the tension

was on the upper cable which he held on with his left hand, is that correct?

A Yes, he did.

Q And the cable and bolt that came off, can you point that out?

A The cable that came off was the cable that he held with his left hand right next to this turnbuckle here.

Q And that caused him to lose his balance and fall off?

A Yes.

MR. KIDANI: Your Honor, I'm going to move to strike the response. The question is too leading, especially in this area of causation.

THE COURT: All right. Sustained.

Q All right. Mr. Tanaka, can you resume your seat, please?

A We just call it, what you call, a locking wire. That's the whole purpose of this turnbuckle.

Q Have you seen the locking wire used in other turnbuckles?

A Yes. Any time we lash heavy lifts, such as tanks, trucks, we always use the locking nut on the turnbuckle, and we also use the locking wire. That's recommended. Otherwise, the insurance inspector won't pass this lashing or whatever is done.

Q When you mention lashing, what do you mean by lashing?

A We use heavy chain and turnbuckles to lash down tractors, trucks. When we say lashing, it's to prevent the thing from shifting, you know.

Q So basically you're tying it down.

A Tying it down so that it doesn't shift while it's in voyage.

Q So, upon your inspection of the cable that came loose and was hanging down, did you see any jam nut or locking nut on the cable that was loose?

A Yes. There was a jam nut but it wasn't tightened; just on the thread itself.

Q Let me refer you to the time that the cable was still hanging down as opposed to the cable being reattached later. At the point when the cable was hanging down on the side, the way you drew it, first of all, was there a U-bolt attached to that cable that was hanging down?

off the barge Oahu.

A No, not with his crew; just he himself. The gang was not helping.

Q Isn't it true also that there are safety belts provided for by Castle and Cooke Terminals for stevedoring

operations?

A Yes.

Q And on the night of the accident the safety belts were available to you and your men.

A No.

Q Weren't the safety belts... .

A On this barge Oahu, we would have mostly what you call break bulk cargo and there were no containers on this particular barge so safety belts were not required on this particular barge.

Q I know, but weren't they available? Didn't Castle and Cooke have safety belts?

A Oh, we had safety belts, but, on this particular barge, there were no safety belts.

Q You didn't use belts on this project.

A Because it was not required.

Q Okay. You didn't use any safety belts on this project.

A No, I did not.

Q The safety belts were available that night if you wanted to get them, isn't that true?

A It was available, if needed.

A When he went to the top, what he did was grab the cable with his left hand.

Q Let me get into that just briefly. I think you said a couple of different things. I may be wrong and I may be the one confused. Would you tell me again which hand Mr. Kong used to place on the top cable?

A He placed his left hand next to the turnbuckle.

Q Now, you're referring to the turnbuckle on the starboard door.

A On the starboard door, yes.

Q Which side of the turnbuckle was his hand? As we look at the picture here,

was he on the left side of the turnbuckle or the right side?

A The right side of the turnbuckle.

Q Okay. And he put his right hand on the bottom cable?

A Yes.

Q Okay. And which cable was stuck?

A The bottom cable.

Q Okay. When you talked about the whipping motion that Mr. Kong did, which arm did the whipping motion?

A He whipped it with his right hand because his left hand was on the cable with the tension on it.

Q So that means he was whipping with his right hand.

A Yes. His left hand was on the cable with the tension. There was tension on the left-hand cable, and the right-hand

cable was the one that was entangled and

that was sagging.

Q Do you remember testifying at your deposition, Mr. Tanaka, that Mr. Kong whipped the cable with his left hand?

A I don't recall that.

MR. ESTES: Can I have Mr. Tanaka's deposition again? Page 55, lines 8 through 14.

(Deposition handed to the witness)

A Oh, yes, this incident here, if I recall now, Kong was communicating with Wesley Furtado there that in between there was an entanglement. So, to take off the entanglement, between Wesley and Donald Kong, Donald whipped with the left hand for the cable that was in between. There was an entanglement between... . You see the door over here?

Q Why don't you come down to the diagram here?

A So at that time, like I said, he was

whipping, he was trying to untangle the cable here. There was an entanglement here. So he whipped with his left hand; and then later on he noticed that the entanglement was here.

Q So there were two entanglements.

A Yeah, right.

Q Okay. Now, the first entanglement that you talked about was over here by what has been identified on this... .

A Yeah, here.

Q Wait. The first one that you talked about was over here next to the follower pulley on the right side of this picture,

Right?

A Yes.

Q And I think you said that the bottom cable got somehow looped over the top cable.

A Looped over the top cable.

Q Would you describe to me what kind of jam or entanglement you're talking about now over here by the... . I think you pointed toward the port turnbuckle.

A The cable was overlapping one another.

Q Which cable was overlapping which?

A At that time I cannot say from where I was standing, but there was an entanglement there.

Q Okay.

MR. ESTES: You can resume your seat.

(Witness resumed the witness stand)

Q Now, in your deposition, if I can read it for you, it says: He tried to untangle the cable by whipping the cable with his left hand, which doing so he just came down head first and landed on the prong.

Now, are you telling me now that there were two times when he whipped the cable, or only one time and that was before he fell?

A As I recall, there was entanglement here and on the pulley itself.

Q Immediately before he fell, was he whipping a cable?

A Yes.

Q Which cable?

A The cable that was loose.

Q The cable that was loose?

A Yes. The cable that was hanging, the underneath cable.

Q And could you tell by his actions which of the entanglement he was trying to free at that time?

A The bottom cable.

Q Well, let's ask it this way. There is one on the right side and one on the

left side. Isn't that what you told me?

A Yes.

Q Okay. Was it the one on the left side or the one on the right side that he was trying to free?

A At that time it was both sides. They tried both sides, you know, the center and, what you call, the right side; the left and the right side.

Q As far as you can tell, was it the same cable that was tangled, only in a different location?

A Yes.

Q Okay. How far away were you from Mr. Kong when he was at the top of the door?

A I would say about 14 feet away.

Q Now, is that all up in the air like this or... .

A From the door, because there was a forklift in front of me, so I kept distance away from the forklift.

THE COURT: Six feet.

Q Mr. Tanaka, wouldn't it have been possible for a person to climb a barge door to wrap a safety belt around one of these vertical members? I think you called them ribs before. Can you secure yourself to the door in that fashion?

MR. NAGLE: Objection. Speculation; calling for a conclusion.

MR. ESTES: Your Honor, I'm just asking whether or not the belt was of sufficient dimension to go around the vertical members there.

THE COURT: You may answer. Go ahead.

A Well, in this particular operation, what you call, we never did use safety belts to unbolt the doors; so I don't think any safety belts were required.

THE COURT: What he was asking, Mr. Tanaka, was, if a man had been

wearing a safety belt, could he have swung it around one of the vertical columns there and clip it to his belt to support himself.

THE WITNESS: Yes. If he had a safety belt, he could have done that, yes.

Q I just want to get one other thing clear. I believe that you stated, and tell me if I'm wrong, that the other barge that belonged to Hawaiian Marine Lines, one other than the barge Oahu, had already been loaded and locked up and shut up and everybody had quit working on that barge; is that

BY MR. KIDANI:

Q Mr. Tanaka, first of all, isn't it true that the cables up above are not safety line cables? Isn't that true?

A They are not, yes.

Q They are not meant to be used for crew members or anybody else as a safety line, isn't that true?

A That's right.

Q In respect to your testimony with Mr. Estes, you indicated that... . I want to get this straight, too. Is it your testimony that Mr. Kong whipped one of the cables with his left hand and the other cable on another occasion with his right hand?

A Well, after I read my depo, you know, thinking back, I recall there was an entanglement in between Wesley and Donald Kong and there was an entanglement on the starboard side of the pulley where Donald was.

Q Did he whip the cable two times?

A He must have whipped it twice, yes.

Q Your testimony now is he whipped it twice.

A I think he did. After I read my

depo, yes.

Q And you don't know who... . Strike that.

MR. KIDANI: Your Honor, can I have the Clerk give to the witness exhibit M30, please?

(Exhibit handed to the witness)

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

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a Delaware corporation; et al.,

Defendants.

TRANSCRIPT OF PROCEEDINGS

VOLUME II OF VII VOLUMES

PAGES 157-306

DATE: May 23, 1986

terminals?

A Yes, they own forklifts.

Q But the forklifts that opened and closed the barge house doors, who owned those forklifts?

A In Honolulu?

Q Yes.

A Castle and Cooke.

Q So the forklifts used to open and close the barge house doors, they belonged to Castle and Cooke.

A Yes.

Q And were you given permission to drive them when you were in that nature?

A No.

Q Marlin, who was responsible for opening and closing the barge house doors which are indicated in plaintiff's exhibit number 1?

A Castle and Cooke Terminals.

Q When you say it was Castle and Cooke,

will you explain how it evolved?

A It's a stevedoring operation to open and uncover and cover hatches according to their contract.

Q Now, this was going on even before you arrived in Honolulu, is that right?

A Yes.

Q Now, when the forklift was used, and I think there is

testimony, to open up the barge house doors, you testified that someone would be manning the winches, is that right?

A Yes.

Q And you said that someone would be manning the winches to prevent jamming.

A Yes.

Q And you mentioned that on two occasions there had been a jam, is that right?

A That's correct.

Q Now, you were there, correct me if I'm wrong, before Donald Kong's accident. You were there working at Hawaiian Marine Lines for at least four years, is that correct?

A In Honolulu?

Q In Honolulu.

A No, that's not correct.

Q How about three years?

A Before Donald's accident?

Q Yes.

A Probably two years.

Q So am I correct that, during the two years that you were there before Donald Kong's accident, that there had been only two jams, two occasions?

A That's correct.

Q And we're taking into consideration the number of voyages that each time it came to Honolulu. How many times would it

A That's correct.

Q Now, there has been some testimony, if I may move on to another subject matter, about your inspection of the turnbuckles and the cable system. Specifically with respect to this door, you mentioned the word visual. I mean did you go on top of the barge house doors every time it came in and did you inspect it real close? Is that what you meant?

A No. I didn't climb up there to inspect it. I took a visual inspection from the deck itself.

Q Standing more than 15 feet away from it?

A Sixteen feet high and about eight feet back.

Q But you would generally look to see if it was attached, that it was not for any reason unsecured, is that right?

A That's correct. As long as it was working, it was fine.

Q Did you have any reason during the time you were there working for Hawaiian Marine Lines have any reason to inspect or to touch any of the turnbuckles on the door of the Oahu for any reason?

A No, I did not.

MR. ESTES: Objection. That's a compound question, if he had an opportunity to inspect or touch.

MR. JIM ON: Okay. I'll use inspect.

MR. ESTES: That has been asked and answered.

THE COURT: No. He may answer.

Q Please answer the question.

A Could you repeat it again?

Q I'll put it in the phrase that I had it. Did you have any reason to inspect

or touch the turnbuckles on the barge Oahu, and I'm talking about the one on top of those batten boards, the ones just above the barge doors? Did you have any reason to inspect or touch them prior to Donald Kong's accident?

A No.

Q Did you have any reason to adjust them?

A No.

Q I want you to explain to the Court about this electric winch system, the recommendation that you had made. Is that correct that you asked for an electric winch on the Oahu?

A Yes. I wrote them a letter to that effect.

Q And what were you specifically told as to why an electric winch would not be installed?

A They told me that the barge was going out of service and they were going to

cut off the house and make it a flat deck container.

Q Which is actually what happened in 1982 to this barge house, is that correct?

A I don't know what year. Yeah, it was 1982.

MR. JIM ON: Your Honor, may I check my list over?

May I ask for a one- or two-minute recess?

THE COURT. Well, let's take a 15-minute recess.

A Charles Onishi.

Q And what is the function of Charles Onishi?

A His actual title is safety and training administrator.

Q What is involved in your job as supervisor to Charles Onishi?

A Approving and overall direction in his duties.

Q Do you actually go out and observe the safety training that goes on by Mr. Onishi?

A From time to time.

Q Isn't it true that, before Donald Kong's accident, there was a safety cage to be used by the forklift?

A You're referring to a personnel carrier?

Q Yes.

A Yes.

Q And how long has Castle and Cooke Terminals had that personnel carrier to be used by the forklift?

A I'm not sure. I was not with Castle and Cooke Terminals much prior to that.

Q Okay. But you are certain that there was one available at the dock to be used by the forklift, is that true?

A I can't be specific as to whether it

was available that year, if that's what you're asking.

Q Castle and Cooke had personnel carriers to be used by forklifts?

A I believe so, yes.

Q And when is it determined that those types of personnel carriers are to be used by the forklifts?

A Normally it would be used for an individual who had to be raised up to a certain height to do some kind of work safely.

Q As a supervisor of the safety administrator, what height would you require your men to use this personnel carrier on a forklift?

A That would depend, but it could also depend on the availability of ladders or the like. Normally I would say anything over 12-15 feet.

Q Anything over 12 to 15 feet.

A Yes.

Q What about safety belts, were those available for Castle and Cooke longshoremen?

A Yes.

Q When are they required to be used by Castle and Cooke Terminals and now Hawaii Stevedores? At what height do you require your personnel to use safety belts?

A They are normally used on top of containers.

Q Any time else?

A I don't think I can answer your question for any other time.

Q Would Mr. Onish have that information?

A Yes.

Q Also, as a safety administrator for Castle and Cooke

affect the way the doors open or close together.

MR. ESTES: Let me split it up then.

THE COURT: That was your first question.

MR. ESTES: That was the first part of the question.

THE COURT: Restate your question.

MR. ESTES: I'll be glad to.

Q Mr. Blundell, if you assumed that the operators of that bargehouse door are using only the manual winch system to open and close the doors, isn't it true that the absence of a lock wire on either or both of the port turnbuckles may create serviceability problems, if you will, in terms of or operational problems, in terms of getting the doors to close together appropriately or

properly but would not in effect create any safety problem?

MR. JIM-ON: I still have a problem because the questions are couched in terms of possibility, and, secondly, it is compound.

THE COURT: You may answer.

A The basic need for the lock wire here is not from the primary point of view of safety. The battening up of the turnbuckles will, as you say, only cause problems particularly in terms of operation of not getting the doors to close exactly where you want them to be. That's one reason for the turnbuckle, yes, sir.

Q Do you have any opinion as to whether or not it's appro-

IN THE UNITED STATES DISTRICT COURT

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TRANSCRIPT OF PROCEEDINGS

VOLUME III OF VII VOLUMES

PAGES 307-440

DATE: May 28, 1986

A When I was employed with Castle and Cooke Terminals, I was first employed as a stevedore, which is a laborer; but, besides being a laborer, I was given subtitles like submachine title, subwinchman, I was a crane operator, alternate log clerk, and acting supervisor.

Q When were you promoted to supervisor with Castle and Cooke?

A I was promoted to operating supervisor April 1980.

Q At the time that you became supervisor, was Mr. Takeo Tanaka the superintendent that was right above you?

A Yes, sir.

Q Mr. Kong, could you tell us your recollection of how the accident happened on December 24, 1980?

A On the night of the accident, we were in the process of loading back the

barges, and, when we got through loading back the barges, we began to close the doors; so we closed the first door, which is the port door, and then we went over to close the starboard door. While in the process of closing the starboard door, somehow it got jammed.

When it got jammed, we looked around to see if there was any HML representative around the area; and, as I recall, I, myself personally, couldn't find anyone. I came back to the door. I climbed up the door on the ladder-like door, and, when I got to the top, I took ahold with one hand on the top cable and with the other hand held on to the other cable.

the forklift to the door through this cable, is that correct? You answered: Yes, sir. Then I asked you: And they

were trying to pull it closed. You answered: That's correct, sir.

Is that true that they were trying to pull the starboard door closed just before you got injured?

A That is right, sir.

THE COURT: Let me interrupt. Do these doors slide back and forth? It didn't open like this?

THE WITNESS: They slide. They slide like that and slide back like that.

THE COURT: Okay. Thank you.

Q Do you recall... . Let me go back. You already testified that the port door, the port door had already been closed, is that correct?

A That is correct, sir.

Q And they were in the process of closing the starboard door pulling the door closed, is that correct?

A That is correct, sir.

Q Do you recall where the hookup was

made for the forklift on the starboard door, where they would attach the cable to?

A No, sir.

Q You don't recall what area of the door.

A No, sir.

Q Do you recall how long the cable was?

A No, sir.

grabbed. Okay. Let me ask you if this statement is true that you made when I asked you at the top of page 15: Do you recall which cable you grabbed; whether or not it is the one with the turnbuckle or the one below the turnbuckle? You answered: I believe at this time I don't know what hand, right or left hand, but I know that I, with one hand, took ahold of the top cable, which is attached to the turnbuckle, that is, attached to the

anchor plate, while the other hand I tried to loosen the cable that I assumed was stuck. Question: So you had both hands on one cable. Answer: Well, at the time, like I say, you got a double cable running, but, like I say, I don't know what hand. But when I was just... . I know the thing happened so fast. Like I say, I had one hand on this cable, another hand on this cable trying to work the thing loose. All I know is the thing just came right off, yeah. I know that the cable that I was trying to loosen up didn't break loose, but the one that I was holding that was attached to the anchor plate, that's the one that came off, but what hand I had on what cable I don't know.

- Is that a true statement, Mr. Kong?

A If I said it in the deposition like it is, it's probably what happened, but, right now, as I can recollect, I don't

remember.

Q Your best recollection is that you were trying to loosen the cable when you were at the top of the starboard door just

to you to be used when you're working at heights, when you have to work above a certain height level?

A There are safety belts that we have but I don't recall if there was any available at that particular pier during the operation that night.

Q What criteria or what heights do you usually have your men wear safety belts?

A I would say roughly about two containers high which is roughly about 16 to 17 feet.

Q How high was the top of this cargo door? Do you recall?

A The height of the door, I don't know the exact height but I would say in the

vicinity of 13 to 16 feet.

Q And where the cables are at the very top, do you recall about how high that was?

A Can you show me on the diagram where you're referring to?

Q The cable that you pointed to that you grabbed, the highest cable, how high is that?

A Well, like I say, I don't know the real height, so I estimate it between 13 to 16 feet.

Q Okay. Why didn't you get a safety belt on the night of the accident to use? Any reason?

A No. Like I said earlier, when I first started there as a stevedore, the practice was to climb up the doors without any safety belt to unloosen the locks so that we can open the doors, and that was the practice and we were taught that way

BEST AVAIL

Q Were you working that night?

A I don't remember, sir.

Q Do you remember whether or not... . Okay. Let me go back. Do you remember when you heard Tanaka give the order to close the door if he also ordered anybody to take up the slack on the winch wheel? Let me rephrase it. Let me go back. Do you know what the winch wheels are on the barge doors?

A I see it there.

Q Do you know what they are for?

A Not really, sir.

Q You never used the winch system?

A No, sir.

Q On the night of the accident, do you recall if anybody was on the winch system?

A No one was there, as I recall, sir.

Q No one was at the winch system.

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A No, sir.

Q No one was taking up the slack at the time... .

MR. NAGLE: Objection. Asked and answered. He said nobody was there.

THE COURT. That's a different question.

Q No one was at that area taking up the slack of the door system when the forklift was pulling the door closed?

A No, sir.

Q Do you recall if Mr. Tanaka gave any instructions to anyone in the area when he was ordering the doors to be closed to get someone over there to pick up the slack?

A No, sir.

Q Did you ever see on this occasion or any other occasion Castle and Cooke

employees trying to take up the slack by hand without using the winch system?

A No, sir.

Q Who was driving the forklift on the night of the accident?

A I believe it was Joe Flores.

Q Who was in charge of the gang on the barge Oahu before you came over that morning?

A I don't know who was in charge of that gang.

Q There's a George... . Is one of your foremen named George at the time of the accident?

THE COURT: Is one of the what?

MR. KIDANI: Foremen.

Q Wasn't your counterpart, one of the foremen, named George, one of the supervisors? Do you recall? George Chock? Do you know who George Chock is?

A Yes, sir.

Q Do you remember if he was working on

the night of the accident?

A No, sir.

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

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Plaintiffs,

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Defendants.

TRANSCRIPT OF PROCEEDINGS

VOLUME IV OF VII VOLUMES

PAGES 441-607

DATE: May 29, 1986

representative, but isn't it true that in your deposition that you did not indicate you went to go look for a representative but indicated to see if you could solve the problem first?

A What was that, sir?

Q Isn't it true that you in fact didn't go look for an HML representative before you went up the barge house door because you wanted to see if you could resolve the problem first?

A If I said that, that's what I probably said at the deposition.

Q Mr. Kong, I want you to turn to volume 3, page 42, of your deposition, and I want to ask you if this is a true statement or not. Line 13, page 42, volume 3.

A What page is that, sir?

Q Page 42.

A Page 42.

Q Yes, line 13. Isn't it true you testified when we asked you the question "Before you went up on the door, did you tell anyone that maybe the vessel owner should get someone down to fix the doors or did you feel it was your responsibility to do it as opposed to the vessel owner? Do you recall?" that you answered "Well, when you say that, I feel it was my job as a supervisor to go and find out what the problem is, and, if it is only something minor and we can solve it, we are going to solve it. But, if we cannot solve the problem,

then we will notify the other party. Question: So, in other words, at the time just before you fell off the door, you were just investigating to see if it was a minor problem or not. Answer: Well, yeah, I feel it was a minor problem

and just, like I say, I was trying to break the cable loose, but just by starting to do that that's when the cable came off.

Isn't that true?

A Well, if that's what I said, that's what I said.

Q And isn't it true you didn't look for an HML representative before you went up on the barge house doors because you felt it was a minor problem?

A Well, maybe at that time I gave the deposition, you know, I don't recall everything; but sometimes things come back that you recall after that, which I should have corrected this deposition at that time when I read it.

Q But isn't it true that at the time you gave us this deposition you testified that you did not look for an HML representative?

A I don't remember.

Q Is this a true statement that you gave in your deposition?

A At the time that I gave the deposition.

Q That that is a true statement? Is this a true statement that I read or not?

A I believe so, s:r.

Q Is that a yes?

A Yes, sir.

MR. KIDANI: Thank you, Mr. Kong. I have no further questions.

THE COURT: Mr. Estes.

MR. ESTES: Thank you, your Honor. Good morning, Mr. Kong.

THE WITNESS: Good morning, sir.

BY MR. ESTES:

Q Mr. Kong, I just want to briefly go over a few of the things that you have already testified to so that I get it clear in my mind.

You indicated that just before your accident that you recall that the forklift operator had closed the port door or the door which is on the left side of this exhibit 1, the drawing, is that right?

A That is correct.

Q Now, were you there when the forklift operator was hooked up to that door and pulling it closed?

A Yes, sir.

Q Okay. Now, as I understand it, after the forklift operator got the port door closed, the left-hand door on this picture closed, he unhooked the cable from that door and then hooked it on the starboard door in an attempt to close the starboard door, is that correct?

A That is correct, sir.

Q Okay. And I believe you testified that, after the forklift operator hooked up the cable to the starboard door, he was able to move it maybe a couple of feet, I believe you said.

A That is correct, sir.

Q Until it got stuck.

A That is correct, sir.

Q So this picture then does not really represent the position of the barge doors at the time of your accident, does it?

A I don't think it's an exact drawing but it is similar to the doors on that barge.

Q I know that this just represents the doors closed, but you said at the time that you went up to inspect the cables and so forth that the doors were stuck; that the right door had only been closed a couple of feet, is that right?

A That is correct, sir.

Q So this picture here in exhibit 1, plaintiff's exhibit 1, which shows the barge doors closed together, does not show how the doors were at the time that you had your accident, is that right?

A That is correct, sir.

THE COURT: Mr. Estes, let me interrupt one second. What is drawn in black there that is labeled manhole? Is that just one door?

THE WITNESS: Can I answer that, your Honor. That's

yourself.

Q You never heard that before on any of your operations with Castle and Cooke Terminals.

A No, sir.

Q Now, Mr. Kong, this was gone into a little bit yesterday but I'd like to get into it briefly, if I could. Mr. Kidani,

when he was cross-examining you, showed you a portion of your deposition transcript, which I believe is contained in volume 3, pages 21 to 22, which dealt with the question of which of the two cables that we're talking about that are on top of the starboard door, which of those was loose or which was tight. Do you remember that discussion yesterday

A To the best of my recollection, I believe that both of these two cables were tight.

Q Do you remember Mr. Kidani pointing out to you in your deposition your testimony to the effect that the top cable was loose or was slacked and that the bottom cable was tight? Do you remember he pointed that out to you that you said that in your deposition?

A But, like I say... .

Q Do you remember him pointing that out? Would you like to see the

deposition transcript again?

THE COURT: All he is asking you is do you remember that Mr. Kidani pointed that out to you yesterday. Do you recall? He asked you yesterday if you said in the deposition

Q You say they were assigned in operations. How were they trained?

A By Marlin Pulliam and myself in that particular area of endeavor.

Q Okay. And how long did the training take place?

A Oh, it was about a six-month training period, sort of on-the-job training.

Q I assume when you mention six months, this preceded the accident, is that correct?

A That is correct, yes.

Q Now, let's head right for the subject matter in question. On or about December

or in the year 1980, could you describe the contractual relationship that Hawaiian Marine Lines had with Castle and Cooke insofar as what Castle and Cooke was responsible to do?

A Well, it was a normal contractor relationship between the vessel owner, who was in the business of hauling freight, and the stevedore contractor; and primarily they were responsible for providing the personnel and the cargo handling equipment which would get the freight off the vessel and subsequently back on the vessel, and it's basically their responsibility to perform that function for us.

Q Was there anything designated as far as responsibility to specifically open and close the barge house doors, say, for example, on the Oahu?

A That was one of the responsibilities Castle and Cooke had under that contractual arrangement, yes.

Q Okay. Now, this contractual arrangement that you specified or alluded to, is this something that was written or oral?

A Well, it was a written contract that was executed by Pacific Island Navigation and I believe, if memory serves me correctly, that it was carried over to Hawaiian Marine Lines on the basis of sort of historical practice, the same contract in effect. It was the same people and the same equipment and the same operation.

THE COURT: I think he's asking was it in writing that they open and close the doors.

THE WITNESS: Yes, it was, sir.

THE COURT: It was in the

contract.

THE WITNESS: Yes, sir, it was.

Q I think that needs further explanation.

MR. JIM ON: I wonder, your Honor, at this time if I could have exhibit EEEE.

(Exhibit handed to Mr. Jim On)

Q Mr. Stiger, I have handed you what has been marked as exhibit EEEE. Can you explain what this exhibit is, please?

A Well, this is a copy of the contract between Castle and
Cooke and Pacific Inland Navigation, the former company of
Hawaiian Marine Lines

Q Now, Pacific Inland Navigation Company, that's PAC that

ing here and manually crank that door open and close. I think what developed

is they simply started to use the forklift as a power so the men didn't have to physically exert themselves to open and close the doors.

Q By the way, did Hawaiian Marine Lines own any forklifts at the Honolulu port?

A No. We didn't have any stevedoring equipment.

Q Now, there has already been testimony in this particular case that on December 22, 1980, the barge Oahu had already docked in Honolulu. Do your records indicate this?

A Yes, they do.

Q Do you know where Marlin Pulliam was that day or that time?

A Well, a review of the records indicate that he was on vacation during that time period.

Q And, in his absence, during the day shift, who would take over?

A That responsibility then fell on my

shoulders.

Q In this particular case, do you know from your records as to the time the barge Oahu on December 22, 1980, docked?

A A review of the records would indicate that it docked at approximately 12:00 noon.

Q What would you have done or what did you do or what was your normal practice when the barge came in?

A Well, it was sort of a routine. We would go ahead and

in and they unload it and load it and send it back to, you know, the West Coast.

Q During those two voyages... . Well, let me ask you this question. November-December of 1980, were you working for Hawaiian Marine Lines?

A Yes.

Q You were not on vacation or anything like that.

A No, I was not.

Q So were you there when the first voyage or when the November, the time that the barge came in, during the November voyage?

A Yes, I was working.

Q During those two voyages that you said you were there, did you ever adjust, fix or touch the turnbuckles that are depicted on the top of the cargo house doors on exhibit number 1, any of the turnbuckles on either the starboard or the port?

A No, not to my recollection.

Q On or around December of 1980 did you have any contracts or understandings with outside repair organizations that did repairs and things on the barge itself?

A Well, we didn't have a specific contract, but, whenever there was

something wrong with the tug or the barge, we would call up Dillingham Shipyard, PAC Marine, WISCO, whoever had people available to do repairs and they would come down and do repairs for us.

ing and there was no one in attendance because we didn't have any help, you know, Marlin was at home or I was at home, whoever the responsible individual is, he had those phone numbers and he would then contact us and say, hey, the generator quit, there's no lights on the barge, come down and fix it.

Q Were there instances in which you were in fact contacted in 1980 by Takeo Tanaka?

A I can't specifically remember instances.

Q Were there any instances before 1980?

A Oh, yes, abundant instances.

Q Do you know if Mr. Tanaka had your number available?

A Oh, yes. It was a standard operating procedure or routine.

Q Were the opening and the closing of the barge house doors on the barge Oahu, were they always supervised by yourself?

A No. I might be down on the tugboat talking to the skipper about getting ready to sail, do this or that, or I might be at the dock office, or Marlin or whoever was the responsible individual. Yeah, they would open and close the doors without a Hawaiian Marine Lines representative on the site.

Q Let me ask you this. On December 1980 do you know if Castle and Cooke personnel had ladders, equipment such as ladders that could reach the height of the barge house door as depicted on exhibit number 1?

A Well, yeah. We always had deck loads

of cargo and they would, as a matter of routine, bring down ladders and personnel

lifts to facilitate putting people on the deck load to remove lashings and also to hook up cargo that had to come off with a crane.

Q Well, what kind of cargo are you talking about?

A There would be glued lam beams, re-bar, pilings, office trailers, I mean anything that we would call top stow cargo, which would be riding on top of the deck load.

Q And what would they be on top of?

A Well, generally on top of containers or lumber, primarily lumber, green lumber.

Q And how high would they be?

A Anywhere from six to twenty feet. The average was about twenty feet.

Q What would the Castle and Cooke employees use besides ladders to ascend those kinds of cargo?

A They had a regular personnel carrier which was, you know, like a manlift. It was a box and the guys would get in there with their gear and they would ride up on the crane or they go up on the forklift to get on top of the deck load.

Q Now, this deck load that you mentioned, and you mentioned lumber, do you know of anyone, do you know if that type of load was stowed on the barge Oahu when it came in on December 22nd.

A Yes. A review of the cargo plan would indicate that we had a deck load of lumber and the top cargo stowed on top of

Q As far as the maintenance, inspection, repair of the barge and its equipment, that was the responsibility of

Marlin Pulliam, correct?

A Yes, it was.

Q Mr. Pulliam testified in his deposition, Mr. Stiger, that as operations manager, he had a custom and practice of inspecting the equipment on the barge Oahu every time it came in to Honolulu. Was that your observation and understanding?

A Well, that's what I used to do, so, you know, when he came to Honolulu in that position, he simply carried on the duties that I had previously performed, yes.

Q And he also said that, as part of his inspection, he would inspect the cables, the bolts, the turnbuckles, the rigging system on the cargo doors. Did you ever do that when you were with HML?

A I believe that I did that on a sort of routine basis. I don't recall specifically but it was sort of a habit

thing that one did.

Q On the voyage of the barge Oahu when it arrived in Hawaii December 22nd, was it...

A Yes.

Q ...at that time Marlin Pulliam was on vacation, is that correct?

A Yes. The records indicate that he was on vacation.

Q And I think he testified that he was in Portland at that

A No.

Q Would you know what the inspection would require, what this particular type of inspection would require?

A Well, I performed Mr. Pulliam's job for a period of seven years prior to his coming to Hawaii.

Q What would you look for as a routine inspection of the riggings on the cargo

door?

A Well, basically all that an individual would look for is to make sure that the cables were not out of the pulleys and, you know, everything was intact and they were taut. They would have to be that way in order to have the barge house doors closed when it departed Portland.

Q Would you also check to make sure that the cable wires are under proper tension?

A They would have to be under proper tension, you know, to get the door closed in Portland.

Q Would you check also that the eyebolts are properly secured to the body of the turnbuckle?

A I don't remember specifically having to do that, Walter. It was, you know, sort of a routine item that you eyeball everything and you open the door after

you have taken the bolts off.

Q Before Mr. Pulliam came to work for Hawaiian Marine Lines, my understanding is that you were... . What was your position before Mr. Pulliam came?

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

CIVIL NO. 82-0176

DONALD L. KONG and MAY S. KONG,

Plaintiffs,

vs.

HAWAIIAN MARINE LINES, INC.,

a Delaware corporation; et al.,

Defendants.

TRANSCRIPT OF PROCEEDINGS

VOLUME V OF VII VOLUMES

PAGES 608-733

DATE: May 30, 1986

barge?

A Yes, to oversee the total operations of loading and discharging.

Q So during the course of the evening you were going between two barges, is that right?

A Yes.

Q Do you know if you saw Mr. Kong earlier that night?

A Yes. He was working on the barge Oahu, the house barge.

Q Do you know if he was working on the other barge?

A I don't believe so. I think he was assigned to the barge Oahu.

Q Okay. Do you remember offhand if he was assigned or not assigned to the Oahu?

A Not totally.

Q Well, in any event, you saw Mr. Kong earlier that night on the barge Oahu. Did you talk to him?

A Yes, an occasional hi and how are things going and that sort of thing.

Q Shortly before Mr. Kong's accident, where were you on the barge Oahu?

A I was walking towards the aft section of the barge and just primarily checking some chains and containers that were loaded at the time, turning towards the doors.

Q Mr. Yuen, the Clerk has handed you exhibit DDD. Can you tell the Court what that is?

A This is a sketch of the barge Oahu.

Q And is that the loading plan that you were to follow?

A It looks like it, yes.

Q Can you show the Court where you were shortly before the accident on that loading plan?

A I was walking towards the back

section of the barge.

Q And where were you just before you came to the aft section of the barge?

A Just in the area where the doors were, walking towards the area of the door in that area on the barge.

Q Now, just before you arrived toward that aft section, did anybody yell out to you or was anybody to your knowledge looking for you?

A No, not that I recall.

Q What do you recall next as you were going to the aft section of the barge?

A I heard a lot of commotion, I guess, and just hearing a lot of commotion and trying to find out what was going on. I slightly turned and someone was going up the batten boards of the house barge, and the next thing I know someone is coming down, falling down.

Q Did you actually see Mr. Kong at the top of the bargehouse doors?

A Yes.

Q What do you remember seeing as you were going towards

the aft section of the barge?

A First of all, I just slightly turned and all I seen was someone yanking on the cable, I guess to free the cable that was stuck; and the next thing I seen, the thing happening so fast, Mr. Kong falling.

Q How much time elapsed from the time you arrived and you saw him up there until the time he fell?

A Probably seconds. I can't recall how fast. Everything happened so fast. Like I said, it was drizzling and it was still dark and a lot of noise going on.

Q Could you see everything clearly at the top of the bargehouse? What was the lighting condition?

A You can't really see clearly because the lights are dedicated on the deck of the barge. You can see probably shadows. I didn't identify Kong up there until the man fell on the deck hitting the forklift and then falling on the deck and at that point it was Mr. Kong.

Q What do you recall happening next?

A Summoning someone to call for an ambulance and getting Mr. Kong attended, taking care. Everything was happening so fast. Finally an ambulance came up and rendering first aid to Kong and taking him away.

Q What occurred next?

A Well, I wanted to secure the ship and get those doors closed so everybody could go home. Everyone, I guess, was

A No. It screwed back very easily.

Q Was there any cable cut or anything

of that nature?

A No.

THE COURT: Did you say cut?

MR. KIDANI: Yes.

A No.

Q Mr. Yuen, did you ever talk to Mr. Tanaka to close the bargehouse doors?

A I don't recall. I honestly don't recall.

Q Did you order the doors to be closed before Kong was hurt?

A No, I don't order the doors. They normally tell us when all the cargo is in and they will go ahead and close the doors themselves.

Q Who is they?

A I'm sorry. The stevedores, the longshoremen.

Q And in this case who was that?

A Castle and Cooke Corporation.

Q What is your understanding as to the closing, of the doors?

A Well, my understanding is that, when they got all the cargo, they shut the doors and let me know that it is closed and that they are ready to secure the ship.

Q What is your understanding as to whose responsibility it is?

A It would be the supervisor's who is assigned to that

of the accident?

A Away from the doors.

Q And was there a forklift in front of the doors at the time of the accident?

A At the time of the accident, yes.

Q Was the forklift being used to close the doors at the time of the accident?

A Yes.

Q And how far were you away from the forklift at the time you say you turned and saw all of these events?

A It's kind of hard to answer that question, sir. I don't know how far. It seemed to me like quite a distance in the dark. At the time there were containers loaded on the aft section also; so whether it would be ten feet or fifteen feet or twenty feet, I'm not positive.

Q Can you show the Court in the courtroom today approximately how far it would be from you to a point in the court?

A Well, where Mr. Kong is seated now, I guess it would be probably where I am, if not a little further.

MR. NAGLE: Your Honor, I believe Mr. Estes walked off this space yesterday. We're talking about approximately twenty-five to thirty feet.

A That's my best guess. That was five years ago.

Q Did you stay in the same position the whole time you were watching the person

going up the batten boards to the time

of the fall?

A No. I was moving around.

Q Were you moving backwards or forwards or where?

A It could be in all directions, sir, forward, backward, checking the turnbuckle, checking the containers, the cones that they are secured.

Q At what point were you checking the turnbuckles?

A Prior to the accident during the beginning of the shift, any time.

THE COURT: You're not talking about the turnbuckles on the door.

THE WITNESS: Turnbuckles that... .

THE COURT: That hold the load down.

THE WITNESS: Yes, holding the

load down, from the deck to the chain to the top of the containers.

Q Were you referring at all to the turnbuckles that were on top of the doors of the barge Oahu?

A No.

Q What was it that first directed your attention to the doors as you were walking backwards?

A Well, there were noises, commotion. It seemed to me like there was some commotion. I seen the shadows skimming up the boards, and the next thing I know someone yanking on the cable and someone falling.

Q Did you see any sort of loop or snag in the cable at that

time?

A Yes.

Q With reference to exhibit number 1,

could you show the Court where this snag or loop in the cable was when you saw it just prior to the accident?

A My best recollection is that the loop was here in this section here.

MR. NAGLE: Okay. May the record reflect that Mr. Yuen is referring to the port side of the port door.

Q And I ask you, Mr. Yuen, with the aid of this red marker, if you would put in on the port door where the loop was.

(Witness complied)

MR. NAGLE: And the record should reflect that Mr. Yuen has done so. Thank you, Mr. Yuen. You can return to your seat.

Q And that loop was visible from where you were twenty-five to thirty feet away.

A Yes.

Q Did you see any other problems with the cable?

A Not to my knowledge, sir.

Q Is it your understanding that HML has control of the equipment on the barges that the stevedores do not run?

A Have control of the equipment? That's all part of the barge.

Q And HML is the company that inspects the equipment on

Q I believe you previously said that you saw the person who went to the top of the doors to try and unloosen the cable in some such fashion, right?

A Yes.

Q And what you saw up there were shadows, right?

A Yes.

Q You didn't actually see Mr. Kong holding on to some particular item, did you?

A Well, I seen a person up there with

two hands yanking on the cables to free them.

Q Did you ever testify before that you weren't certain that that's what you saw?

A I did testify that that's what I saw, I guess.

Q You guess?

A I guess.

MR. NAGLE: If I may approach the witness, your Honor.

Q Mr. Yuen, I show you a copy of your deposition. This was taken on May 19, 1986. I'd like to refer you to lines 6 through 9 on page 45, if you will read those, please.

(Witness examines deposition)

Q At that time, did you testify to the following question: So you saw two hands on the same cable. Answer: Yeah, I believe, I thought I saw two hands pulling the cable because he tried

pulling it loose and he... . I'm not certain.

Kidani's direct examination, we're entitled to go into this a little bit further.

THE COURT: Go ahead.

A Like I said, things were going on. There was a commotion. I'm not sure if I did see, well, the forklift trying to close the doors at the time.

Q From the time that you first glanced back at the door until the time Mr. Kong reached the top of the door, what time frame are you talking about?

A Everything happened so fast. It could be a matter of seconds or a minute.

Q During that period of time, did you see anyone else going up the port door at any time after you turned around to glance after hearing the commotion?

A I don't recall.

Q During the period of time that Mr. Kong is going up the door and you're watching him, did you at any time say: Wait, I'll do it; I'll go up.

A Really there wasn't much time to do anything. Everything moved so fast. It was just at an instant someone pulling on the cable and someone falling. I had no time to really see what he was actually doing or how long he was up there.

Q Did you at any time object? From the time you first saw the person starting to climb the batten doors, did you object to the person going up?

Q Mr. Yuen, are you aware of this turnbuckle above the door ever separating before?

A No.

Q In respect to the... . You were

asked about the dogging of the doors, some of the doors. In respect to the dogs, what dogs... . Well, let me back up. How many times have you done that?

A I don't know how many times I've done that.

Q A few times.

A Yes, a few times I would say. It's not a normal thing that I would do.

Q Would you be watching other people do it or would you actually do it?

A No. I would be watching other people do it, the stevedores.

Q So that your testimony is clear, when you say you dogged, you're watching the stevedores actually do the manual work.

A Yes.

Q What is your understanding as to the responsibility of dogging? Whose job is that?

A That would be the stevedores.

Q In respect to the night of the

accident, just before the accident, you're positive you were aboard the vessel Oahu.

A Yes. I was on the barge Oahu.

Q And you're positive that you did see somebody yanking

distributed or disseminated around the time of the accident, this was produced; so am I correct in assuming that these rules were given to the operation supervisors in draft form around the time of the accident?

A I'm not too sure whether it was at the time of the accident.

Q Was it at or near the time of the accident, if you don't know the specific date?

MR. NAGLE: Objection, your Honor. He has already testified he is unsure at what point in time these were

given to the people.

THE COURT: You're unsure whether it was given before or after Mr. Kong's accident?

THE WITNESS: I'm more inclined to believe it was after the accident. That's about the best, but I do remember why it was prepared in this manner. That was primarily for the benefit of new employees coming to the company.

Q Is it your testimony then that it was prepared only after the accident in this case?

A As best as I can recall. I would have to go back and check the file.

Q Let me ask you this then, Mr. Onishi. With respect to ladders, ascending areas of heights above six feet or seven feet, were there any discussions with the operation supervisors at or near the time as to what the requirements were of Castle

and Cooke as to the manner of ascending heights?

MR. NAGLE: Same objection as previously noted, your Honor. We're getting into the matters of ladders.

THE COURT: Overruled.

A If there was, I just can't recall whether I had discussed with them about, if you're going over a certain height, for example, over eight feet, use a ladder or something.

Q Isn't it true that, at or near the time of the accident, the operation supervisors were informed, instructed or otherwise told that to ascend heights above certain levels that ladders were required to be used and to be secured?

MR. NAGLE: Objection. No foundation.

THE COURT: He may answer, if he

knows.

A If they were informed, I can't remember if it was done by me or somebody else.

Q When you say me or somebody else, are you saying they were never informed by you but by someone else in this case around that time?

THE COURT: He said if they were informed by somebody else. He doesn't know if they were or not.

Q Is it my understanding that, at or near the time of the accident, Castle and Cooke did have personnel carriers?

A Yes, they do.

Q And that personnel carrier was fitted together with the forklift to permit an individual to rise or go up to a certain

height, is that correct?

A I believe that's the usual manner in which the carriers are used. Of course,

they are also used by a crane, in other words, attaching a line from the crane to the carrier and people sitting in the carrier.

Q Now, in this particular case, there were what we call are barge house doors. There has been previous testimony that they had a height of about 12 or more feet. Is it my understanding that at or near the time of the accident that you had ladders, Castle and Cooke personnel had ladders, that could reach those particular heights?

A I'm sure there were.

Q And it is my understanding that these particular ladders were located within or near the wharf area.

A That, I don't know.

Q There were ladders and there were personnel carriers available at least as part of the equipment of Castle and Cooke around the time of the accident, is

that correct?

A That's correct.

Q With respect to the personnel carriers, am I correct in assuming that the operation supervisors or individuals were instructed as to how to use these personnel carriers?

A Yes. I believe they are familiar with them.

Q They are familiar because you must know how to hook them up and how to get into the cage, isn't that correct?

I'll first ask him whether or not he was aware of it.

THE COURT: Go ahead. Do you remember that meeting/

THE WITNESS: I was not in the meeting.

Q You were not in that particular meeting?

A No.

Q As a safety and training administrator at that time, my question to you, sir, is, based on your knowledge and experience in this case, if an employee, and you have specifically observed or were aware of an employee climbing the batten boards to the barge house, if that was done and you were aware of it, could you tell me what action you would have taken?

MR. NAGLE: May I note an objection, your Honor. Number one, I don't think we have an appropriate foundation for Mr. Onishi as far as him giving an expert opinion as far as safety in this matter. He may be a safety administrator but I think the Court can see his safety background and training was woefully inadequate for him to render an opinion in that area. And also I believe counsel is calling for a

conclusion as to the issue in this case.

THE COURT: He may answer. You were asked, Mr. Onishi, what you would have done if you had seen someone climbing up the batten board doors.

THE WITNESS: Well, obviously, if he was going up a considerable height there, I would have put a stop to it.

Q What do you mean by considerable height?

A Well, according to the regulations, any time you go up to eight feet, you have to have a safety belt for one thing; another situation there is use a ladder.

Q And if a ladder wasn't available.

A Well, you just have to find some other means of doing it other than climbing up the door.

Q In this particular case, prior to the accident, did you have any incidents or

investigate any incidents in which you told employees or supervisors that was not using the ladder or was ascending heights without the use of ladder or without the use of personnel carrier, did you have any cause to investigate that sort of situation?

A As best as I can recall, no.

Q When a barge such as the Oahu came in, is it my understanding that you generally inspect the barge or the vessel that came in?

A Yes. I try to make it a point to go and check over and inspect the vessel, yes.

Q And is it my understanding that you would be checking for the access area and generally around the area where the stevedores would be working, is that right?

A I would try to make a walk-through of the vessel, yes.

Q And, if you weren't there, would Brian Scholtes do it or someone else in your stead?

A Yes. Brian would probably try to do it.

industry, I believe we started back doing work with them in 1979, the early part of 1979 is the best I can remember.

Q In respect to the barge Oahu, on or about October-November-December of 1980, during that time period before December 24, 1980, did you know of any incident where the turnbuckle disengaged from any part of that cabling system on the barge Oahu before Mr. Kong's accident?

A No.

Q With respect to that cabling system, is there a term that would be used for that cable? Is there a term like a safety line? Is there a term that would

be assigned to that cable?

A It would be an operating cable or running cable.

Q What do you mean by operating cable?

A Well, it would be used to open the door, to cause the door to open or close.

Q And it is also referred to as a running cable?

A Yes.

Q Are there other types of cabling system on the barge?

A Yes. We have other types of cable systems on the barge. Some of the safety rails or hand rails around the perimeter of the house and some of the fence stanchions have safety rails, cable safety rails.

Q Are there different requirements... . Let me rephrase that. Do you do anything different in inspecting and operating a running cable as opposed to a safety rail cable?

have been opened for cargo discharge. Upon leaving Hawaii, the doors would have been closed again. That's three times.

Upon arrival at Portland, the doors would have been opened again, cargo loaded. Upon departing, the doors would have been closed again. That would be five times. Upon arrival in Honolulu, again the doors would be opened one more time. That would be six times.

Q So, during the process of closing, after the 6th opening or the use of that cabling system, is that true?

A I didn't hear the question.

Q That would be about the sixth time.

A About the sixth time, yes.

Q Can you explain to the Judge why it is not on a regular schedule?

MR. KIDANI: I withdraw that. Let me ask another question.

Q Is it that you don't do any inspection at all of that cabling system during 1980?

A Was there any inspection of it?

Q Yes.

A Apparently there was an inspection of the cable because we got a work item to replace those cables; so somebody had looked at them.

Q And that request came from where?

A To the best of my recollection, it came from Marlin over

here. It was written on a work order to change those cables.

Q Other than that inspection, did you conduct any form of inspection during 1980 of the cabling system on an unscheduled basis?

A Other than probably standing on the deck and looking at the cables from the

deck.

Q What would you do when you would be doing that? What would you be looking for?

A Loose or broken or hanging cables. If it was hanging down, it would have been obvious.

Q How many riggers did Hawaiian Marine Lines or Columbia Marine Lines have in its employ in 1980?

A We have no regulars in our employ.

Q When you refer to riggers in the industry, what do riggers do?

A Riggers basically, they don't all work for shipyards, by the way, but riggers primarily work in ship repair. The riggers in the shipyards are the experts in the yard moving heavy loads with cranes or in rigging up cable systems and this type of thing.

Q Is that a specialty in and of itself?

A Yes, it's a specialty. It's a craft

of its own.

Q And what riggers did Crowley Maritime or Hawaiian Marine Lines use?

A We used WISCO in this particular case.

A Yes.

Q During that time period, do you remember any incident of a turnbuckle unloosening?

A No.

Q Or separating?

A No.

Q Were there any problems with respect to jamming?

A No.

Q Do you recall any incident of the turnbuckle slacking to the point where the cargo doors could not be opened?

A No.

Q Would you have remembered?

A I think I would remember that, yes.

Q Now, at the times that you were there when the cargo doors were opened, you did a visual inspection? I'm sorry. Let me ask you this. What kind of inspection, if any, did you do with the cable and the turnbuckle system during the time period November-December of 1980?

A When the barge comes in in the morning, when we want to start the barge, what we do is stand on the deck before you tell the longshoreman and the stevedore to pull on the doors. You just look up and make sure that nothing was hanging or jumbled up up there; and, if that was okay, you go ahead.

Q What about inspection? Do you look at every piece of the swedge?

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

CIVIL NO. 82-0176

DONALD L. KONG and MAY S. KONG,

Plaintiffs,

vs.

HAWAIIAN MARINE LINES, INC.,

a Delaware corporation; et al.,

Defendants.

TRANSCRIPT OF PROCEEDINGS

VOLUME VI OF VII VOLUMES

PAGES 734-851

DATE: June 3, 1986

pulling, all it does then is it wants to go in that direction. Torquing is when the cable, because it is wound up on a unit or something, then it tends to twist; and, as it twists, even if the jam nut appears to be tight, if you try to turn in against the jam nut, you don't go anywhere. But, if you turn it against the jam nut, then it backs it off because the jam nut does not preclude unloosening in the true sense; because, once you get pulling, you're stretching the bolt. It takes the tension off the jam nut. It interfaces between the bottom of the nut and the shoulder of the bottom. You lessen that, reduce that frictional characteristic, the jam nut has no more function. It does not preclude now from reeling off, from moving, and that's why a jam nut is placed on here just to show what it did and what it doesn't do.

Q What effect would whipping the cable do, if you're back of a cable? What effect would you have on this cable or turnbuckle if you would try to whip it?
A Well, vibration is an engineering study. It shows that most fasteners come loose due to vibration. You can study fasteners in shipping from the East Coast to Alaska, pieces in the electronic industry, in a power transformer, all drop off by the time it gets to Alaska; because, even with lock washers, if they are improperly torqued, they will drop off, and I have seen hundreds of pieces drop off as a result of vibration going across country.

Q Mr. Wong, can you show the Court as to what would happen in terms of any torquing motion on that?
A Okay. If there is any torquing as a

result, then what happens is, if you turn, if you move the unit, then you tend to loosen up; and, as you rotate and if it's fastened on slightly, then potentially what you can do is you will back off the cable. In this case, it doesn't take much to back it off; but not knowing that you're only in a thread or two, you still have enough strength to pull on a roller, because there is nothing until at a certain point you get this, and at that point, once you vibrate and turn it off, then it comes off, and it only took about a turn, one revolution.

So you've still got holding power even with that one thread, and there is also a function of how well the threads are formed and these threads have been corroded, so therefore it takes even less to come loose.

Q Mr. Wong, what is meant by the term

frictional characteristic?

A Okay. Coefficient of friction is a dimensional value. It is just a number. Generally it is less than one. So what you do is, like the tire, when you skid a tire, you have an average; we use a point seven. The test might show point eight. Well, if you take the weight, the normal weight, perpendicular weight to the surface, multiply that by the friction value, then it tells you how much it takes to slide

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THE COURT: This is my question. What would stop the door from moving?

THE WITNESS: Now, until yesterday and today which you demonstrated in court, I did not know that that was the system of Mr. Tanaka. My impression has always been that there

was a whipping, and today you showed in court to me that he actually untwisted the cable.

THE COURT: I didn't mean to do it. I didn't mean to show that, if that's what you inferred.

THE WITNESS: That's what I saw as well as what Mr. Jim On described to me as turning the cable, both cables, which then to me indicates that the cables for some reason got crossed over each other. If you had to untangle... . Because the cable system, if it is straight, it is parallel. The only way is when you develop a loop and the cable, due to unwinding characteristics, wraps itself up in such a manner that they couldn't pull itself against itself. That's what it implies to me when I heard that he tried to twist the two cables.

THE COURT: I'm not sure we have any evidence to that.

MR. NAGLE: Your Honor, may I note an objection that he is assuming facts not in evidence.

THE COURT: Yeah. I understand that. I'm not sure we have any evidence of that, Mr. Wong. I'm sorry if I gave

belt, or a cage that can either be hoisted with a crane or a different type of cage that can be lifted with a forklift or a hyster.

Q What is your understanding of safety belts and its use as it existed back in 1980 at the time of the accident?

A Safety belts have been available for years, and we even use them on occasion, when you have to work in a position that exposes you to danger. The safety belt is very simple to use. It is strictly a very secure belt around the waist. There are a number of different designs--they

are three-four-five feet long--and they have a snap at the end.

MR. JIM ON: Your Honor, with this Court's permission, I have not marked the safety belt. I was going to use this as an exemplar for the Court's illustration.

THE COURT: Go ahead.

MR. JIM ON: For the record, may the record note that I am handing the individual what is a safety belt.

THE COURT: The record will note you handed it to Mr. Smith.

MR. JIM ON: May the record note I'm handing it to Mr. Smith.

Q Can you identify the object that I have placed before you and describe it?

A Yes. The object before me is what is commonly known as a safety belt. It's a reinforced nylon belt that one would

put around your waist or around your chest, and it has what we call large D rings secured to the belt. It has about a three-and-a-half or four-foot nylon pendant to which is attached a snap hook at the outboard end.

Q Basically, I wonder if you could stretch that exhibit out and indicate to the Court... . Well, we can see the part that relates. You're putting it around your waist, but could you show us the length of that safety belt?

A (Witness complied)

Q What is on the end? There appears to be a ring on the end.

A Okay. This is what would be the attached what some would call the D ring or the I ring.

Q And what would be the relationship of the I ring to the object that you're holding in your left hand?

A Okay. This is the snap hook, and the snap hook can either be attached to something such as a padeye or a stanchion or fitting, or the pendant can be looped around and brought back into the D ring, and this is the most common way of doing it if you're close to something that you can attach to.

Q Do you know whether or not this type of safety device which you have identified as a belt was available to Castle and Cooke employees back in 1980?

A Yes, I've seen them use it.

Q And you have seen Castle and Cooke employees in fact

using that very same safety belt around that time, is that correct?

A A belt similar to that, yes.

Q Now, could you describe any other type of application to the safety belt as

you know or as you have... . Strike that question. Can you describe the applications of the safety belt as relates to how you know, I'm sorry, as it relates to stevedoring practices you have experienced?

A Well, the most common place that we see it used is when stevedores have to approach a situation where there is not good footing or that they have to hang over the edge or something to secure a line. We have seen some real difficult things to hook up to a crane where they had to climb aloft. Those are probably the most common places that you see stevedores using the safety belt.

At Matson, in climbing over two containers high, the company does require that their employees do use the safety belt.

Q When you say containers, how high is the usual container?

A One container is eight feet, so anything over the first container, they want their employees to use the safety belt.

Q Now, are there any other applications to a safety belt aside from containers and situations that you have described? Are there other circumstances that may involve difficult lifts?

A Well, we are all very common or we have commonly seen the

telephone lineman, and all the telephone linemen use a safety belt that's quite similar to this when they are going up on a telephone pole, and you see them with a belt around their waist and they get up on the telephone pole and they wrap the pendant around he pole and they keep that going up with them; so that, should they slip or fall, they don't go all the way

to the ground. That's probably the most common place where the layman would see the belt used. But most anyone working on an offshore platform or large offshore sailboats, safety belts or harnesses are very common, but you see them all the way through the industry.

The window washer that you see washing the windows of a large building, he is using a safety belt not much different than this; and so it's very common in the industry.

Q Thank you very much, Mr. Smith. My final question to you is: Throughout the course of the time of the trial we have been using the phrase or the phrase has been used "one hand for the ship, one hand for yourself." Are you familiar with that phrase?

MR. NAGLE: Objection, your Honor. First of all, we haven't been using it throughout the trial; and I

don't see how it is really relevant or material to this matter.

THE COURT: He may answer.

A Yes. The term is a very old one and a very common one, and we use it quite often in joking even. But it really refers

to, if you're getting yourself in any position where you're off balance or working in an area where there is any danger at all, you work with one hand at the most and you keep one hand firmly onto something. You never use two hands for the job while in a dangerous position.

THE COURT: You could if you had a safety belt.

THE WITNESS: You can if you have a safety belt,

but not if you don't have a safety belt,

your Honor, or if you have other safety equipment. But even working aboard a vessel, it is very, very common that you always maintain one hand for your grip, you know, to maintain your balance wherever you are and one hand to work with, but you never let completely go if you're in a dangerous position.

Q This practice that you have noted of one hand for the ship and one hand for yourself, is this something that is restricted to those involved in maritime work, such as the vessel operator; or do you know, is it so wide spread as to apply to those who are involved in the stevedoring industry?

A It would be anyone engaged--and I don't think the term applies only to the maritime industry, although, at best I know, the term generates from the old sailing ships... .

THE COURT: Just a minute now.

Mr. Jim On, you are now really asking him to express an opinion here, and so I'm going to cut it off. What the terms means is one thing but... .

APPENDIX A

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

CIVIL NO. 82-0176

DONALD L. KONG and MAY S. KONG,

Plaintiffs,

vs.

HAWAIIAN MARINE LINES, INC.,

a Delaware corporation; et al.,

Defendants.

TRANSCRIPT OF PROCEEDINGS

VOLUME VII OF VII VOLUMES

PAGES 851-End

DATE: June 4, 1986

I, Dianna W. Orndoff, Certified Shorthand Reporter, Honolulu, Hawaii, do hereby certify that the foregoing is a true and correct transcript of proceedings in Civil No. 82-0176, DONALD L. KONG, et al. vs. HAWAIIAN MARINE LINES, INC., held in the United Stated District Court, District of Hawaii, Honolulu, Hawaii, on May 22-23, 28-30, June 3 and 4, 1986, before the Honorable Charles L. Hardy, Judge.

September 2, 1986

/s/ Dianna W. Orndoff CSR #170

APPENDIX B

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

CIVIL NO. 82-0176

DONALD L. KONG and MAY S. KONG,

Plaintiffs,

vs.

HAWAIIAN MARINE LINES, INC.,

a Delaware corporation; et al.,

Defendants.

DEPOSITION OF
GEORGE N. CHOCK, JR.
Taken on behalf of the Defendant
Hawaiian Marine Lines, Inc.

PAGES 1-29

DATE: July 24, 1984

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

DONALD L. KONG and MAY S. M. KONG,	)	
Plaintiffs,	)	
vs.	)	CIVIL NO. 82-0176
HAWAIIAN MARINE LINES, INC., et al.,	)	
Defendants.	)	

DEPOSITION OF GEORGE N. CHOCK, JR.

Taken on behalf of Defendant Hawaiian Marine Lines, Inc. at the office of Kidani, Oshima & Wong, 300 Stanford Court, 233 Merchant Street, Honolulu, Hawaii, commencing at 9:17 a.m. on Tuesday, July 24, 1984, pursuant to Notice. BEFORE:

Barbara McLean, Certified Shorthand Reporter
Notary Public, State of Hawaii

APPEARANCES:

For Plaintiffs:

WALTER S. KIRIMITSU, ESQ.
Shim, Sigal, Tam & Naito
Suite 900, 333 Queen Street
Honolulu, Hawaii 96813

For Defendant
Hawaiian Marine Lines, Inc.:

SHELTON JIM ON, ESQ.
Kidani, Oshima & Wong
300 Stanford Court
233 Merchant Street
Honolulu, Hawaii 96813

1A

For Castle & Cooke
Terminals Limited:

MURIEL M. TAIRA, ESQ.
Char, Hamilton,
Campbell & Thom
Suite 2100, Mauka Tower
Grosvenor Center
737 Bishop Street
Honolulu, Hawaii 96813

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A No.

Q Do you know of or are you aware of any complaints prior to December 24, 1980 about the conditions of the barge house doors or about any condition on the barge

itself, complaints from your men or from Castle & Cooke Terminal employees; are you aware of any?

A I wasn't aware of any.

Q Have you had any contact with any Hawaiian Marine Lines employees?

A No.

Q The safety equipment that was issued, were you issued any particular safety equipment?

A What do you mean by safety equipment?

Q Like hard hats.

A That we have.

Q You were required to wear that --

A On the job.

Q -- on the job at all times?

A At all times.

Q And you were required to purchase your own safety shoes?

A Safety shoes.

Q What about safety belts?

A Safety belts the company provides

that whenever it is necessary.

Q What were the safety belts used for?

A For heights.

Q Any kind of heights or any time you climbed?

A Yes.

Q The ladders that you mentioned, where were the ladders stored?

A Usually if we have an operation, say, they inspect the ship, whatever, whatever equipment that we need for that operation would be there, you know, when we start that operation. The couper takes care of that like the ladders or whatever.

Q Are there ladders that can take you up to 12 feet or more?

A Say, usually the ladders we use are one container height so that would be about 13 feet. Other than that if it was higher than that we usually use the

personnel carrier.

Q Where is the personnel carrier, where is that usually located?

A Right on the wharf.

Q When you say on the wharf where in particular on the wharf?

A Well, close to whatever job you are doing.

Q Say for example if the barge OAHU came in.

A The barge always parks and the personnel carrier

APPENDIX C

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

CIVIL NO. 82-0176

DONALD L. KONG and MAY S. KONG,

Plaintiffs,

vs.

HAWAIIAN MARINE LINES, INC.,

a Delaware corporation; et al.,

Defendants.

DEPOSITION OF
ROBERT PIATT
Taken on behalf of the Plaintiffs

PAGES 1-76

DATE: August 20, 1985

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

DONALD L. KONG and MAY S. M. KONG,	)	
Plaintiffs,	)	
vs.	)	Civil No. 82-0176
HAWAIIAN MARINE LINES, INC.,a Delaware corporation; WILLAMETTE IRON AND STEEL COMPANY and GUY F. ATKINSON COMPANY,	)	
Defendants.	)	
and	)	
CASTLE & COOKE TERMINALS, LIMITED and NATIONAL UNION FIRE INSURANCE COMPANY,	)	
Intervenors,	)	
and	)	
HAWAIIAN MARINE LINES, INC.,	)	
Defendant and Third-Party Plaintiff,	)	
vs.	)	

WILLAMETTE IRON AND STEEL COMPANY and GUY F. ATKINSON COMPANY,	)
Third-Party Defendant.	)

DEPOSITION OF ROBERT PIATT
Taken in behalf of the Plaintiff

August 20, 1985
Portland, Oregon

BE IT REMEMBERED that the deposition of ROBERT PIATT was taken in behalf of the Plaintiffs, pursuant to the Federal Rules of Civil Procedure, before Terri J. Mundt, Registered Professional Reporter and Notary Public for Oregon, on Tuesday, the 20th day of August, 1985, at the Marriott Hotel, Portland, Oregon, beginning at the hour of 9:45 a.m.

APPEARANCES

SHIM, TAM, KIRIMITSU & NAITO
By: Mr. Walter S. Kirimitsu, appearing in behalf of the Plaintiffs;

KIDANI, OSHIMA & WONG
By: Mr. Grant K. Kidani, appearing in behalf of Defendant and Third Party Plaintiff, Hawaiian Marine Lines;

BURKE, SAKAI, McPHEETERS, BORDNER & GILARDY
By: Mr. James T. Estes, Jr., appearing in behalf of Third Party Defendants Willamette Iron & Steel and Atkinson.

ALSO PRESENT

Mr. Bob Schile

Q Why not?

A Because they are not used on a routine basis like the internal turnbuckles are. The turnbuckles internally have to be put on and taken off each time the door is opened or closed.

Q Now, once again, these are like routine preventive maintenance steps that Hawaiian Marine Lines takes. Is that every time it comes in to Portland?

A To the best of my knowledge, time permitting, almost every time they grease the door sheaves and check the turnbuckles, yes. The engine is always serviced. That is routine. Deck winches are greased; that is routine. Towing gear is looked at; that is routine.

Q Is there anything done to check the doors as to whether or not they are aligned properly so that the bolts fit

properly?

A Not by us. That is usually by the cargo supervisor. If he has a problem with the doors he will call and tell us, "Hey, I need some help in pulling the turnbuckles up," something like that.

Q In Portland the cargo supervisor would be whom?

A Again, John Lanagan or one of his men.

Q Now, getting back to the work order, and I'm referring to the one dated October 24, 1981 that you have there in front of you: once this work order is prepared is there any

No. _____

In the Supreme Court of the
United States

October Term, 1987

DONALD L. KONG; MAY S. KONG

Petitioners,

vs.

HAWAIIAN MARINE LINES, INC., a
Delaware corporation;
WILLAMETTE IRON AND STEEL COMPANY;
GUY F. ATKINSON COMPANY,

Respondents.

CERTIFICATE OF SERVICE

I, Grant K. Kidani, a member of the Bar of this Court, hereby certify that on November 20, 1987 . three copies of the Brief of Respondent Hawaiian Marine Lines, Inc. in Opposition to Petition for Writ of Certiorari in the above-entitled case were served by personal delivery upon the following at the address shown below:

WALTER S. KIRIMITSU, ESQ.
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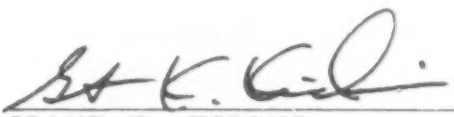
Honolulu, Hawaii 96813
Attorney for
WILLAMETTE IRON & STEEL CO.
and GUY F. ATKINSON CO.

I further certify that all parties required to be served have been served.



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